Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October 1995 - October 1996 Term

JAMES GRAHAM,

Petitioner,

against

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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32 pp

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A. QUESTIONS PRESENTED:

1. Whether Section 296 (16) of the New York Executive Law is preempted by Federal Law.

2. Whether federal nuclear regulations provide a specific statutory exception to Section 296 (16).

B. LIST OF PARTIES

1. **JAMES GRAHAM,**

Petitioner-Plaintiff,

2. **NIAGARA MOHAWK POWER CORPORATION,**

Respondent-Defendant.

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3. *Hines v. Davidowitz*, 312 U.S. 52, 60 S. Ct. 399.

4. *Jones v. Rath Packing Co.*,430 U.S. 519, 97 S.Ct. 1305.

5. *Pacific Gas & Electric*, 461 U.S. 190, 103 S.Ct. 1713.

6. *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 219, 67 S. Ct. 1146.

7. *Savage v. Jones*, 225 U.S. 501.

8. *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L. Ed. 307.

9. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441.

10. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed 2d 416.

F. BASIS OF JURISDICTION.

The Order sought to be reviewed was entered by the Clerk of the New York Court of Appeals on May 2, 1996. The basis of jurisdiction is 28 USC Section 1254(1), as Petitioner is appealing from a decision of the highest Court of the State of New York.

G. STATUTORY AND REGULATORY PROVISIONS.

1. Section 296(16) of the New York Executive Law:

"It shall be an unlawful and discriminitary practice unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the State in any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely through the individual involved any arrest or criminal accusation of such individual not been pending against that individual which was followed by the determination of that criminal action, as defined in Subdivision 2 Section 160.50 of the Criminal Procedure Law, in connection with the licensing employment or providing credit or insurance to such individual, provided that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms or deadly weapons."

2. Section 160.60 of the New York Criminal Procedure Law:

Upon the termination of a criminal action or proceeding against a person in favor of such person, is defined in Section 160.50 of this chapter, the arrest and prosecution shall be deemed a nullity and the accused shall be restored in contemplation of law to the status he occupied before the arrest and prosecution. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession or calling.

Except where specifically required or permitted by statute of a superior Court or upon specific authorization of a specific Court, no such person shall be required to divulge information pertaining to the arrest or prosecution.

3. 10 C.F. R. 73.57 (c) (1)

A licensee may not base a final determination to deny an individual unescorted access to the nuclear power facility or access to safeguard information solely on the basis of information received from the FBI involving:

(i) An arrest more than one year old for which there is no information of the disposition of a case; or

(ii) An arrest that resulted in dismissal of the charge or an acquittal.

4. 10 C.F.R. 10.11 (a) (8), (9)

5. 10 C.F.R. 73.56 (b) (1)

6. 10 C.F.R. Section 973.57

7. 42 U.S.C.A. Section 5841

8. 42 U.S.C.A. Section 2169 (Supp.1993)

9. 635 NYS2d 405

H. STATEMENT OF FACTS.

Beginning in 1961, James Graham (hereinafter "Graham") was arrested on charges of Grand Larceny. These charges were based on the conduct of Shirley Ann Graham, an individual to whom Graham was married at the time. The charges were subsequently dismissed.

In 1967, Graham was arrested on charges of passing a worthless check. Again, Graham was arrested as a result of said Shirley Graham's activities. No disposition was reported on these charges. As Graham was released and no further prosecution or conviction resulted from them, Graham believed that in fact they were dismissed. And in effect, they were.

On or about March 1, 1992, Graham was engaged by his union to work as a pipefitter at the Nine Mile Two Nuclear Power Facility of Niagara Mohawk Power Corporation (hereinafter "Niagara Mohawk"). For such purposes Graham filled out an application for security clearance. In such purposes Graham filled out an application for security clearance. In such application, Graham was wrongfully asked by Niagara Mohawk whether he had ever been dismissed and that his record had been sealed, Graham answered that he had not in fact been arrested.

Thereafter Niagara Mohawk excluded Graham from its Nuclear Power Facilities for a period of two years on the alleged grounds that he had been found untrustworthy and unreliable by reason of his alleged failure to state that he had been arrested.

As Graham lived in a rural area, he found little work in his field during the two years that followed. Thus as a result of the exclusion, he suffered considerable hardship and

experienced severe financial losses.

Graham brought suit against Niagara Mohawk in New York Supreme Court on the grounds that it had violated Section 296 (16) of the New York Executive Law by (1) asking him whether he had ever been arrested, and (2) denying him security clearance as a result of such questioning.

The federal questions were raised by Niagara Mohawk in its answer, in which it argued that federal nuclear regulations allowed and even compelled it to make inquiries as to arrests. Thus, it further argued: (1) the state law was superseded by the federal regulations and (2) the regulations provided a specific exception to the statute taboo of questions involving arrest.

At the time it submitted its answer, Niagara Mohawk removed the case to federal court. By order dated May 17, 1994, the United States District Court returned the case to New York Supreme Court.

On motion, the trial-level court granted summary judgment dismissing the complaint. In a decision of November 4, 1994, the Court ruled that (1) by reason of the regulation, the statute allowed the question to be asked and (2) even if Niagara Mohawk violated the New York statute, the statute was superseded by the regulations.

The decision was upheld on appeal by the Appellate Division, Fourth Department of the New York Supreme Court. No written decision was issued.

By decision entered May 2, 1996, The New York Court of Appeals denied Graham's motion for permission to appeal.

GROUNDS FOR CERTIORARI

GROUND I

Section 296 (16) of the New York Executive Law is not preempted by Federal Law

The decision of the Courts of the State of New York in the case are contrary to the holdings of the United States Supreme Court regarding the preemption by federal law over state law. The Supreme Court has consistently held that where there is no conflict between state and federal law, either expressed or implied, state law applies. Specifically, as held in *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270, state law may apply, in the absence of a conflict, even in cases involving such federal matters as nuclear regulation.

It is our contention that no conflict between state and federal law exists in the case herein. As the state law forbidding Niagara Mohawk to question Graham with regard to Graham's prior arrest. His prior arrest does not conflict with or potentially impede federal nuclear regulations, the state law remains in effect.

The Supreme Court has fully set forth, in *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270, the test by which to determine whether or not a state law is preempted by federal law as specifically applied to nuclear regulation.

The first part of the test seeks to determine whether the pre-emption is expressed in the explicit language of the federal law. 496 U.S. at 78, 110 S. Ct. at 2275. The second part seeks, in the absence of explicit statutory language, to determine the scheme of federal regulation in a given field is extensive so as to give rise to the reasonable inference that the Congress in-

tended for the federal government to dominate the field. 496 U.S. at 79;110 S. Ct. at 2275.

Where the "(S)cheme of federal regulation (is) so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it "[O]r where a federal law" (t)ouch(es) a field in which the federal interest is so dominant the assumption is created that the federal law has pre-empted the applicable state laws. *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 67 S. Ct. 1146. Yet in order for a federal law to pre-empt state law in a field that has been traditionally policed by the states, the Congressional interest to so pre-empt the powers of the States must be "clear and manifest." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152.

The third part of the test inquires into whether the state law is actually in conflict with the federal law. *English v. General Electric Co.*, 496 U.S. at 79, 110 S. Ct. at 2275. As the Supreme Court stated in *Hines v. Davidowitz*, 312 U.S. 52, 67, 60 S. Ct. 399, 404 a case concerning state registration of aliens, "Our primary function is to determine whether, under the circumstances of (a) particular case, the (state) law stands as an obstacle to the accomplishment and execution of the full purposes of Congress." In the absence of such an obstacle being placed by the state law, no conflict exists and the state law is not pre-empted. *English v. General Electric Co.*, 496 U.S. 72, 90, 110 S. Ct. 2270; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373, U.S. 132, 142, 83 S. Ct. 1217; *Savage v. Jones*, 225 U.S. 501, 533.

English v. General Electric Co., supra, concerned a plaintiff who sued her former employer, a nuclear power agency, on

grounds that had arisen from her employment at its nuclear power facility. Among the causes of action listed in the complaint was that of intentional infliction of emotional distress. The issue therefore arose of whether that tort cause was precluded by federal nuclear laws.

Finding no explicit statutory language that would pre-empt the state law on the intentional infliction of emotional distress as arising from the operation of a nuclear power facility, the Supreme Court passed on to the next question of whether the state law was made in a field dominated by federal government. Laws concerning the intentional infliction of emotional distress were rooted in torts, a field of law that was of traditional interest. In the field of nuclear regulation, the federal government has exclusive control on matters of safety so as to pre-empt all state laws on that question. *Pacific Gas & Electric* 461 U.S.190,212, 103 S. Ct. 1713, 1726. Yet *English* concerned intentional infliction of emotional distress, a tort of action in the common law of the States. Here the court held that laws made in areas of traditional state concern, such as tort law, may nonetheless apply to the operation of a nuclear power facility without conflict or pre-emption. As the Court stated:

> **In addressing this issue, we must bear in mind that not every state law that in some remote way may effect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field. We have no doubt, for instance, that the application of state minimum wage and labor laws to employees at nuclear facilities would not be pre-empted, even though these laws**

> **could be said to affect tangentially some of the resource allocation decisions that might have a bearing on radiological safety. Instead, for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that the claim for intentional infliction of emotional distress may have some effect on these decisions... nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field.**
>
> 496 U.S. at 83, 110 S. Ct. at 2270.

Finding in the legislative history no "clear and manifest" intent of Congress to pre-empt state law on the issue (496 U.S. at 83, 110 S. Ct. 2278), the Court moved on to the question of whether the State law frustrated Congressional intentions behind the nuclear regulatory statutes. Ruling that it did not, the Court held that the plaintiff's claim of intentional infliction of emotional distress was not pre-empted. In conclusion, the Court declared, "The Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict.'" 496 U.S. at 90, 110 S. Ct. at 2281.

As in *English*, the State law at issue here is not pre-empted by federal law. As stated above, neither the federal statutes nor the federal nuclear regulations expressly authorize Niagara Mohawk, or other nuclear agencies to ask applicants whether they have ever been arrested.

On the second level of inquiry, Section 296(16) of the New York Executive Law is not concerned with safety or other nuclear regulatory matters. Rather, it is concerned with matters traditionally policed by the States such as employment, human, civil and anti-discrimination rights. The federal regulations, therefore, would pre-empt the State law only if Congress displayed a "clear and manifest" intent to pre-empt State law on these matters.

In its motion papers, Niagara Mohawk stated the concern of the Nuclear Power Commission regarding criminal convictions of applicants, as reflected in 10 C.F.R. Section 10.11(a)(8),(9). Yet Graham was never convicted. Inquiries into conviction records of applicants are not at issue. Niagara Mohawk has also produced compelling reasons for its assertion that the Congress intended for background checks to be done on applicants. Yet this is not at issue. The only issue here is whether the Nuclear regulations authorized Niagara Mohawk to ask Graham whether he had ever been arrested; and neither Congress nor the Nuclear Power Commission, through either the legislative history or through the Statutes or regulations, revealed a "clear and manifest" intent to pre-empt State law on this issue.

Finally we must address the question of whether the Section 296(16) of the New York Executive Law, as applied to the facts in this particular case, would frustrate the intention of the Congress in promulgating laws regarding Nuclear regulation and safety. The intention of Congress, and of the Nuclear Regulatory Commission, was to secure safety in the operation of nuclear power facilities. Therefore, the Nuclear Regulatory Commission ratified regulations not merely allowing but

commanding nuclear agencies to conduct investigations into the backgrounds of persons seeking access to secured areas at power facilities so as to ascertain their trustworthiness and reliability.

In no respect does Section 296(16) frustrate that purpose. It does not seek to block agencies from conducting background check, from conducting fingerprint investigations or from asking applicants whether they have ever been convicted of a crime. It therefore fully allows agencies to obtain the information from which trustworthiness and reliability are determined.

No such permission, however, is given. 10 CFR 73.56 (B) (1) (2) dictates that nuclear agencies must conduct background checks on applicants seeking access to secured areas at nuclear power facilities. 10 CFR Section 973.57 requires that fingerprint checks be made of applicants in order that the FBI may conduct thorough background investigations thereon.

Yet nowhere do these regulations expressly or specifically require or allow inquiries to be made as to **arrest** records of applicants. Nowhere do they allow an agency to ask an applicant whether he or she has ever been arrested.

To the contrary of Niagara Mohawk's assertions, the state and federal laws of this issue closely parallel and are kindred in spirit to one another. Both reflect a strong concern for human rights. Significantly Section 10 C.F.R. Section 73.57(c)(1) states:

> **A licensee may not base a final determination to deny an individual unescorted access to the nuclear power facility or access to safeguard information solely on the basis of information received from the**

FBI involving:

(i) An arrest more than one year old for which there is no information of the disposition of a case; or

(ii) An arrest that resulted in dismissal of the charge or an acquittal.

It must, be according to this regulation that "trustworthiness" and "reliability" be defined. A person arrested by not convicted is not considered a threat to nuclear safety. Instead, he or she is given statutory and regulatory protected.

This regulation, therefore, not merely renders questions concerning arrests unnecessary; it also expresses a legislative repugnance toward them.

Niagara Mohawk states that it did not deny Graham access because of the arrest but because rather he was untrustworthy in that he "lied" about the arrest. Indeed, the Court granted summary judgment in agreement with this assumption. But this is in fact an assumption of fact and does not warrant and is not adequate grounds for the granting of such judgment.

This fact is disputed by Graham. As stated in the record, the Frederick McCarthy representing Niagara Mohawk told Graham that he would have not been excluded had it not been for the Graham larceny arrest. Such a statement clearly points to the fact that McCarthy was motivated by the arrest and by the severity of the charges. Thus, by stating that it made its decision based on Graham's proported untrustworthiness, it is merely trying to go around the back door in an attempt to punish him for the arrests.

Moreover, this particular question is clearly analogous to the "fruit of the poisonous tree" doctrined in Federal Constitu-

tional criminal law. In Constitutional criminal law, where the police have obtained information or evidence illegally and unconstitutionally, the evidence is excluded from being used for purposes of criminal prosecution. *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307; *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441; *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L. Ed. 2d 416.

Therefore, where Niagara Mohawk asked a question illegally, it cannot lawfully punish Graham for the answer he gave to the question.

Finally, according to New York Law, Graham was not being dishonest.

Section 160.60 of the New York Criminal Law states:

> **"Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined by Section 160.50 of this chapter, the arrest and prosecution shall be deemed annuity and the accused shall be restored in contemplation of the law to the status he occupied before the arrest and prosecution. The arrest and prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession or calling. Except where it is specifically required or permitted by statute of a superior Court or other specific authorization of the specific court, no such person shall be required to divulge information pertaining to the arrest or prosecution."**

Thus, pursuant to the dismissal of the charges, the exonerated person is restored to the status that he or she enjoyed prior

to the arrest. By operation of law, the arrest becomes nonexistent. It follows from this that was being truthful when he stated that he had not been arrested.

In the absence of a contrary federal law, then, the state law applies. And even in a matter involving public security such as nuclear regulations, human rights laws apply. For it is paramount to our national interest maximum consideration be given to human rights even in the presence of other vital issues.

GROUND II

THE REGULATIONS DO NOT PROVIDE A SPECIFIC STATUTORY EXCEPTION TO SECTION 296 (16) OF THE NEW YORK EXECUTIVE LAW.

Graham does not contest Niagara Mohawk's power or duty to do a background check in order to ascertain whether applicants seeking access into high security areas in nuclear power facilities are trustworthy and reliable. Nor does Graham contest Niagara Mohawk's federally given power to do fingerprint checks on applicants. Nor does Graham contest Niagara Mohawk's power to ask applicants if they had ever been convicted of a crime. Such activities fulfill a serious public purpose. It is in the public interest that thorough security investigations be made of persons seeking access into such places. This public policy has been expressed by Congress in its statutes and by the Nuclear Regulatory Commission agencies in its regulations.

But, Graham contests that Niagara Mohawk acted unlawfully in (1) asking him whether he had ever been arrested and (2) in excluding him from its facilities. With regard to both wrongs, Graham is backed by Section 296 (16) of the New York Executive law which states:

> **"It shall be an unlawful discriminatory practice unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the State and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely through the individual involved**

any arrest or criminal accusation of such individual not then pending against that individual which was followed by a determination of that criminal action, is defined in subdivision 2 of section 160.50 of the criminal procedure law, in connection with the licensing, employment or providing credit or insurance to such individual, provided that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms or deadly weapons."

Graham's first arrest resulted in dismissal of the charges. The second arrest resulted neither in prosecution nor in conviction. It was tantamount to a dismissal. Therefore, Niagara Mohawk violated Section 296(16) in asking Graham whether he had ever been arrested.

The order of the Court is contrary to the strong public policy favoring the presumption of innocence of persons accused of a crime. This presumption is one of the foundations of Anglo-American jurisprudence. It forms the basis of Section 296 (16) of the New York Executive Law. It is also the basis of Section 160.60 of the New York Criminal Procedures Law, which is stated hereinabove, nullifies the arrest and returns the accused to the status that he or she enjoyed prior to the arrest.

As stated in Ground I above, the federal nuclear regulations do not compel or even allow a nuclear agency to ask an applicant whether he or she was ever arrested. The regulation forbidding the exclusion of a person from a nuclear secured area by reason of an arrest that either (1) resulted in a dismissal of the charges or (2) is more than one year old and has no

reported disposition negate any need on the part of the agency to ask questions regarding arrests.

Moreover, these regulations are not statutes. In its briefs made on motion, Niagara Mohawk cited the statues of the Energy Reorganization Act of 1974 (the "ERA"), 42 U.S.C.A. Section 5841 et. seq. (1983) and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (the "Security Act"), 42 U.S.C.A. Section 2169 (supp. 1993).

But these statutes do not allow expressly or implicitly inquiries to be made as to arrest records of applicants seeking access to high security places at nuclear facilities. 42 U.S.C.A. Section 2169, in fact, expressly seeks to protect applicants who had been arrested where either the arrest has resulted in dismissal of the charges or where the arrest is more that one years old and no disposition has been reported. This concern is reflected in the nuclear regulation at 10 CFR Section 73.57 (C) (1).

Dated: July 24, 1996.

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APPENDIX

Lower Court Decisions and Orders

James Graham,
Plaintiff,
v.
Niagara Mohawk Power Corporation,
Defendant.

Civil Action No. 93-CV-542 (FJS)

UNITED STATES District Court
Northern District Of New York

DECISION AND ORDER

Introduction

This action was originally brought in the Supreme Court for Onondaga County in February 1993 and was then removed to this court by the defendant on the grounds of federal question jurisdiction. On April 29, 1994, the parties came before the court to argue their respective views of the merits of defendant's motion for summary judgment. However, upon reviewing the papers, the court raised sua sponte the issue of the basis of federal jurisdiction and questioned whether removal had not been improvident. The court allowed the parties to file post-hearing briefs on this issue.

The court has now examined those post-hearing briefs. The following constitutes the decision of the court as to the existence of federal jurisdiction.

Federal Question Jurisdiction

The fact that the defendant removed this action to this court does not alter Congress's mandate that even after an action has been removed, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).[1]

In his amended complaint, plaintiff simply stated in his fourth cause of action that he sought relief for defendant's "violations of New York statutes, Federal statutes and Federal Nuclear regulations." Amended Complaint at ¶ 16. In so pleading, plaintiff did not specify the specific federal statute allegedly granting him a cause of action. Similarly, in his opposition to defendant's motion for summary judgment and at oral argument, plaintiff failed to refer the court to any federal statute providing him with a justiciable remedy. This failure to identify a federal statute providing plaintiff with a private right of action is fatal to federal question jurisdiction.

Plaintiff suggests that he may rely on regulations promulgated pursuant to the Omnibus Diplomatic Security and Anti-Terrorism Act, codified at 42 U.S.C. § 2169, which comprises an amendment to the Atomic Energy Act. However, with one exception, courts considering the question have held that the Atomic Energy Act itself does not create a private right of action. See *Pacific Legal Foundation v. State Energy Resources Conservation & Dev. Comm'n.*, 659 F.2d 903, 931 (9th Cir. 1981),

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[1] While a party or the court may only raise alleged procedural defects in the removal process within 30 days of the filing of the notice of removal, this time limitation does not apply to issues of subject matter jurisdiction.

aff'd on other grounds, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983); *Liesen v. Louisiana Power & Light Co.*, 636 F.2d 94, 95 (5th Cir., Unit A 1981); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied sub nom., General Pub. Utils. Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981); *Burton v. Kuakini Health Sys.*, Civil No. 86-0269, slip op. at 2 (D. Haw. September 26, 1986) (available on LEXIS, Genfed library, Dist file). *See contra Drake v. Detroit Edison Co.*, 443 F. Supp. 833, 837-42 (W.D. Mich. 1978). This court is persuaded by the prevailing authority and finds that the Atomic Energy Act does not provide a private party with a cause of action.

In light of his lack of a statutory remedy under that statute, plaintiff's attempt to maintain his action in a federal court on the basis of regulations promulgated pursuant to that statute is unavailing. A private remedy is available under a regulation only where the statute itself contains a private right of action and the regulations imply a private remedy. *Ashbrook v. Block*, 917 F.2d 918, 926 (6th Cir. 1990); *Angelastro v. Prudential-Bache Secs.*, 764 F.2d 939, 947 (3d Cir.), *cert. denied*, 474 U.S. 935, 106 S.Ct. 267, 88 L.Ed.2d 274 (1985). Neither prerequisite exists here and consequently, the plaintiff has no private right of action under the applicable Nuclear Regulatory Commission regulations.

Supplemental State Law Claims

Defendant argues that despite the fact that the plaintiff has no federal cause of action, this court should exercise its pendent jurisdiction to consider plaintiff's state law and common law claims. Defendant correctly identifies this as an issue in which discretion is vested in the district court. See *DiLaura v. Power Auth. of the State of New York*, 982 F.2d 73, 80 (2d Cir. 1992). However, the court will not review these claims. The Supreme Court has cautioned that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cahill*, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 619 n. 7, 98 L.Ed.2d 720 (1988). The plaintiff has not shown why these factors favor the exercise of pendent jurisdiction in this case. Accordingly, the court declines to exercise its pendent jurisdiction.

Conclusion

It is hereby ORDERED that this matter be remanded to the Supreme Court for Onondaga County.

IT IS SO ORDERED.

Dated: May 17, 1994
Syracuse, New York

FREDERICK J. SCULLIN, JR.
UNITED STATES DISTRICT JUDGE

Order Appealed From, Honorable Leo F. Hayes

At a special term of the Supreme Court for the County of Onondaga held at the County Courthouse, Syracuse, New York, on September 30, 1994.

PRESENT: HON. LEO F. HAYES

JAMES GRAHAM,
Plaintiff,
v.
NIAGARA MOHAWK POWER CORPORATION,
Defendant.

ORDER
Index No. 93-668
RJI No. 33-94-1590

State of New York
Supreme Court – County of Onondaga

A motion having been made by Defendant for an Order pursuant to CPLR 3212 for summary judgment, and said motion having come on to be heard on September 30, 1994, and upon consideration of the Notice of Motion for Summary Judgment, the affidavit of Robert A. LaBerge, Esq., dated August 16, 1994, the affidavit of Frederick R. McCarthy, dated July 28, 1994, the Memorandum of Law in Support of Niagara Mohawk's Motion for Summary Judgment, the Reply Memorandum of Law in Support of Niagara Mohawk's Motion

for Summary Judgment, all filed by Defendant in support of its motion for summary judgment, the affidavit of James Graham dated September 12, 1994, and the Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, all filed by Plaintiff in opposition to Defendant's motion, and due deliberations having been had, it is hereby

ORDERED, that said motion be and the same hereby is granted, and it is further

ORDERED, that the Amended Complaint is dismissed in its entirety with prejudice.

DATED: November 7, 1994

Leo F. Hayes, J.S.C.

Decision of Honorable Leo F. Hayes
dated November 4, 1994

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RE: JAMES GRAHAM v. NIAGARA MOHAWK POWER CORPORATION
RJI 33-94-1590

Gentlemen:

This shall constitute my letter decision in the above-entitled matter, and supplements my comments from the bench at oral argument on September 30, 1994.

The underlying lawsuit involves numerous claims by plaintiff, all flowing from plaintiff's assertion that Niagara Mohawk improperly denied the plaintiff unescorted access security clearance to the Nine-Mile Point One and Two Nuclear Power Plants.

Niagara Mohawk moved for summary judgment on an assortment of grounds. Essentially though, it contends that its actions with respect to plaintiff's unescorted access application were authorized by federal laws regulating safety and security at nuclear power plants. Furthermore, Niagara Mohawk takes the position that the plaintiff was not denied unescorted access

because of his prior criminal history, but rather because he failed on two separate occasions to respond accurately and completely to questions on its unescorted access clearance application.

Summary judgment is granted with regard to claims arising under federal statutes and regulations, as these matters have already been ruled upon by Judge Scullin of the United States District Court in related litigation.

Plaintiff's claim for interference with contract is dismissed as unsupported in law.

With regard to plaintiff's other claims, this Court is satisfied that the Nuclear Regulatory Commission approved the security plan and the various application forms used by Niagara Mohawk, and that federal law pre-empts applicable state law in this field. Even assuming arguendo that there is no pre-emption, Executive Law §296(16) provides that such inquiries by the employer would not be an unlawful discriminatory practice where "specifically required or permitted by statute".

Lastly, the affidavits and documentation submitted by the defendant support its position that it did not deny plaintiff access based upon his history of arrests, but rather his lack of trustworthiness and reliability when, after the routine F.B.I. check, it became obvious that the plaintiff was less than truthful on his certification applications.

Plaintiff's amended complaint is dismissed with prejudice, the Court has signed the proposed order submitted by defendant, and it is returned herewith.

Very truly yours,
Honorable Leo F. Hayes
Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL
DEPARTMENT

DECISIONS FILED

NOVEMBER 15, 1995

HON. M. DOLORES DENMAN, PRESIDING JUSTICE

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JOHN F. LAWTON

HON. LEO J. FALLON

HON. RICHARD C. WESLEY

HON. JOHN J. CALLAHAN

HON. JOHN E. DOERR

HON. JOHN P. BALIO

HON. REUBEN K. DAVIS

HON. DAVID O. BOEHM, ASSOCIATE JUSTICES

CARL M. DARNALL, CLERK

1671. (Oneida Co.) — TWAINA C. WATKINS, APPELLANT, V CITY OF UTICA, RESPONDENT. — Order unanimously affirmed without costs for reasons stated in decision at Supreme Court, Tenney, J. (Appeal from Order of Supreme Court, Oneida County, Tenney, J. - Summary Judgment.) PRESENT: GREEN, J. P., PINE, FALLON, CALLAHAN AND DOERR, JJ. (Filed Nov. 15, 1995.)

1677. (Onondaga Co.) — ALFRED W. BOYLE, RESPONDENT, V JOHN L. MANNIX, APPELLANT, AND CHRIS TARRO, RESPONDENT. — Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Onondaga County, Pooler, J.— Summary Judgment.) PRESENT: GREEN, J. P., PINE, FALLON, CALLAHAN AND DOERR, JJ. (Filed Nov. 15, 1995.)

1681. (Oneida Co.) — RICHARD CARNEY, APPELLANT, V DUXBAK, INC., AND UTICA DUXBAK CORPORATION, RESPONDENTS. — Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Oneida County, Murad, J. - Labor Law.) PRESENT: GREEN, J. P., PINE, FALLON, CALLAHAN AND DOERR, JJ. (Filed Nov. 15, 1995.)

1683. (Onondaga Co.) — JAMES GRAHAM, APPELLANT, V NIAGARA MOHAWK POWER CORPORATION, RESPONDENT. — Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Onondaga County, Hayes, J. - Summary Judgment.) PRESENT: GREEN, J. P., PINE, FALLON, CALLAHAN AND DOERR, JJ. (Filed Nov. 15, 1995.)

1686. (Genesee Co.) — PEOPLE OF THE STATE OF NEW YORR, RESPONDENT, V THOMAS K. DE SALVO, APPELLANT. — Judgment unanimously affirmed. Counsel's

application to withdraw granted (see, *People v Crawford*, 71 AD2d 38). Memorandum: Defendant's sentence must be consecutive (*see*, Penal Law § 70.25 [2-a]). (Appeal from Judgment of Genesee County Court, Morton, J. — Attempted Burglary, 3rd Degree.) PRESENT: LAWTON, J. P., WESLEY, BALIO, DAVIS AND BOEHM, JJ. (Filed Nov. 15, 1995.)

1689. (Erie Co.) — MATTER OF JOSEPH GREANY, APPELLANT, V FRANK E. IRVIN, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, THOMAS A. COUGHLIN, III, COMMISSIONER, NEW YORR STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS. Judgment unanimously affirmed without costs. Memorandum: The contention of petitioner that he was denied due process as well as the right to call witnesses is without merit. At petitioner's rehearing, the Hearing Officer was unable to obtain the presence of two persons petitioner had requested as witnesses but was unable to identify. The Hearing Officer advised petitioner that he was unable to ascertain the identities of those witnesses because the Department of Correctional Services lacked a tracking mechanism to determine who was in a particular cell on a given day and further stated that the prisoner log book did not contain the names or current location of those witnesses. Thus, the record establishes that a sufficient attempt was made to identify the witnesses: "[n]either the departmental regulations nor due process require[s] a more extensive search" (*Matter of Law v Racette*, 120 AD2d 846, 848).

We reject the contention of petitioner that respondent violated 7 NYCRR 254.5 (b) by taking a witness's testimony via speakerphone. There is no requirement that a witness be

physically present when testifying at a Tier III disciplinary hearing. Petitioner's speculation that the person on the speaker-phone was not the witness that he had requested has no support in the record.

The further contention of petitioner that his hearing was untimely because it was not held in accordance with 7 NYCRR 251-5.1 is without merit. Supreme Court directed that the rehearing be commenced within 14 days of its order and completed within seven days thereafter (*cf., Matter of Hawkins v Scully*, 146 AD2d 627), and it is uncontested that the hearing was commenced and completed within that time frame.

With respect to petitioner's five remaining contentions, petitioner failed to exhaust his administrative remedies regarding three of them by not raising them at the Superintendent's hearing (*see, Matter of Nelson v Coughlin*, 188 AD2d 1071, *appeal dismissed* 81 NY2d 834), and the others were rendered moot when the determination in the first hearing was reversed and the penalty expunged (*see, Matter of Hearst Corp. v Clyne*, 50 NY2d 707).

App. 13

DECISION May 2, 1996

4-10 Mo. No. 25

James Graham,
Appellant,

v.

Niagara Mohawk Power Corporation,
Respondent.

State of New York Court of Appeals

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

State of New York, Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second day of May 1996

4-10 Mo. No. 25

James Graham.
Appellant,

v.

Niagara Mohawk Power Corporation,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Donald M. Sheraw
Clerk of the Court

Supreme Court, U.S.
FILED
OCT 31 1996
CLERK

No. 96-507

In The

Supreme Court of the United States

October Term, 1996

JAMES GRAHAM,

Petitioner,

vs.

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the New York State Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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23 pp

LIST OF INTERESTED PARTIES

The Petitioner is James Graham.

Respondent Niagara Mohawk Power Corporation is a publicly held New York corporation. Niagara Mohawk Power Corporation has no parent company and has only one nonwholly owned subsidiary, Canadian Niagara Power Company, Ltd.

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Respondent Niagara Mohawk Power Corporation ("Niagara Mohawk" or the "Company") asks the Court to deny the petition for writ of certiorari of Petitioner James Graham ("Petitioner"). The petition seeks review of a New York state court dismissal of a state law cause of action. The decision of the New York Supreme Court was unreported. It was affirmed, without opinion, by the New York Appellate Division at 635 N.Y.S. 2d 405 (4th Dep't 1995) and, thereafter, leave to appeal was denied by the New York Court of Appeals at 667 N.E. 2d 378 (1996), *petition for cert. filed*, 65 U.S.L.W. 3295 (U.S. July 29, 1996) (No. 96-507). (For the convenience of the Court all citations to the lower court decisions will be to those attached as Appendices to the petition).

STATEMENT OF JURISDICTION

Niagara Mohawk respectfully submits that the decision below rests upon independent state law grounds that are adequate to support judgment. Therefore, this Court lacks jurisdiction over this petition under 28 U.S.C.A. § 1257(a) (West 1993). *See* pp. 6-7 below.

STATEMENT OF THE CASE

Niagara Mohawk opposes the petition for two independent, compelling reasons. First, Petitioner's arguments are not supported by the New York statute in question, nor by its prior application by the New York state courts. Second, if Petitioner's interpretation of the New York State statute were correct, the state law would restrict, and potentially compromise, unescorted access clearance requirements at a nuclear power plant. Because these access requirements were established in accordance with the federal nuclear safety statutes and regulations, Petitioner's state law claim would be preempted by federal law.

The material facts in this case are not disputed. Between September 1990 and March 1992, Petitioner applied to Niagara Mohawk for unescorted access clearance to work at the Nine Mile Point Nuclear Power Station in Scriba, New York ("Nine Mile Point"), on two separate occasions. Petitioner was asked about his arrest record as part of a general background screening process that included certain inquiries about criminal history. On both occasions, Petitioner responded, under oath, that he had never been arrested. Niagara Mohawk discovered that Petitioner had misrepresented his arrest record when it received a comprehensive criminal history report from the FBI. Niagara Mohawk's security personnel subsequently interviewed Petitioner and determined that his "trustworthiness and reliability" had been called into question. The Company therefore denied Petitioner's unescorted access application, finding that he could not satisfy the minimum requirement necessary for clearance under the applicable federal laws or the Nine Mile Point security plan.

Petitioner contends that, under New York law, Niagara Mohawk should not have asked him these questions about his arrest record and that, therefore, he should be excused from his failure to be candid and forthright about his prior arrest record. The New York state courts rejected Petitioner's arguments not only because they conflicted with the compelling interests reflected in the federal nuclear safety laws, but also because they were not supported by a plain reading of the New York statute in question or the facts in this case.

For the reasons explained below, Niagara Mohawk respectfully submits that there is no jurisdictional or substantive basis for this Court to disturb the determination of the New York state courts in this matter.

A. Course of Proceedings and Disposition of the Case Below

Petitioner commenced this action in New York Supreme Court, Onondaga County, on February 8, 1993. In his initial complaint, Petitioner asserted only a single cause of action under the New York Human Rights Law, N.Y. Executive Law § 296(16), (McKinney's 1986) (the "Human Rights Law"), alleging that Niagara Mohawk's unescorted access screening process violated that statute's restrictions on criminal history inquiries. The Company answered the complaint by indicating that Petitioner was not denied unescorted access to Nine Mile Point because of his criminal history, but rather because he failed on two separate occasions to respond accurately and completely to questions during the security clearance application process. The Company additionally explained that its inquiries and decision with respect to Petitioner's unescorted access application were fully authorized by the federal nuclear safety and security laws and the regulations promulgated thereunder by the United States Nuclear Regulatory Commission ("NRC").

On April 6, 1993, Petitioner served an Amended Complaint in which he restated the same factual allegations and asserted additional causes of action, including one purportedly based upon the federal nuclear safety laws and regulations. Niagara Mohawk answered the Amended Complaint and removed the action to the United States District Court for the Northern District of New York on April 26, 1993. Niagara Mohawk thereafter moved for summary judgment following the necessary discovery. With respect to Petitioner's federal claims, the district court accepted Niagara Mohawk's argument that Petitioner did not have a private right of action under the federal nuclear statutes or regulations. (Petition, App. 3). The district court dismissed Petitioner's federal claim, but declined to exercise supplemental jurisdiction over his remaining state

law claims. (*Id.* at App. 4). This action therefore was remanded to the New York Supreme Court, Onondaga County, on May 17, 1994.

On August 16, 1994, Niagara Mohawk renewed its motion for summary judgment in New York Supreme Court. Following oral argument, New York Supreme Court Justice Leo Hayes granted Niagara Mohawk summary judgment on Petitioner's Human Rights Law claim for several reasons. First, Justice Hayes found that ". . . the Nuclear Regulatory Commission approved the security plan and the various application forms used by Niagara Mohawk, and that federal law pre-empts applicable state law in this field." (Petition, App. 8). Second, Justice Hayes held that, even assuming, *arguendo*, that there is no pre-emption, Niagara Mohawk's inquiries did not violate the Human Rights Law because they were "required or permitted" by the nuclear regulatory laws. *Id.* Finally, Justice Hayes held there was no triable issue of the fact under the Human Rights Law in any event as the Petitioner was not denied access because of his criminal history, but rather because he was less than truthful on his unescorted access application. *Id.*

On November 15, 1995, the New York Supreme Court, Appellate Division, Fourth Department, affirmed Justice Hayes' decision unanimously, without opinion. (*Id.* at App. 10). The New York State Court of Appeals thereafter denied Petitioner's Motion for Leave to Appeal. (*Id.* at App. 15). The petition for writ of certiorari was filed with this Court on July 29, 1996.

B. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.2, Niagara Mohawk brings the Court's attention to the fact that

there were actually three independent grounds for the dismissal of Petitioner's Human Rights Law claim.

The petition correctly states that Justice Hayes "ruled that: (1) by reason of the regulation[s], the statute allowed the question to be asked, and (2) even if Niagara Mohawk violated the New York statute, the statute was superseded by the regulations." (Petition, 5). However, as noted above, Justice Hayes additionally ruled that:

> [t]he affidavits and documentation submitted by [Niagara Mohawk] support its position that it did not deny [Petitioner] access based upon his history of arrests, but rather his lack of trustworthiness and reliability when, after the routine F.B.I. check, it became obvious that [Petitioner] was less than truthful on his certification applications.

(Petition, App. 8).

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE NEW YORK STATE COURT DECISION RESTS UPON INDEPENDENT STATE LAW GROUNDS ADEQUATE TO SUPPORT JUDGMENT.

This Court declines to review questions of federal law decided by a state court whenever the state court's decision ". . . rests on a state law ground that is independent of a federal ground and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see also Fox Film Corp.*

v. Muller, 296 U.S. 207, 210 (1935). Indeed, this Court has recognized that this "independent and adequate state ground doctrine" is jurisdictional. *Coleman v. Thompson*, 501 U.S. at 729 (stating that "[b]ecause this Court has no power to review a state law interpretation that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.").

Niagara Mohawk respectfully submits that any one of the three grounds set forth in Justice Hayes' decision is adequate to support the dismissal of Petitioner's claims under the Human Rights Law. While the first ground is rooted in federal law (*i.e.*, preemption), the other two grounds were based upon Justice Hayes' interpretation and application of New York state law. These independent state law grounds make it unnecessary to reach the preemption question and thus are sufficient to preclude review by this Court. *Id; see also Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) (stating that "[w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views on federal laws, our review could amount to nothing more than an advisory opinion.").

A. The New York Human Rights Law Does Not Prohibit Inquiries into an Unescorted Access Applicant's Criminal History.

Justice Hayes correctly recognized that the Human Rights Law, on its face, does not prohibit all criminal history inquiries. Instead, the statute expressly excludes from the prohibition any inquiry that is "required or permitted" by other laws.

In adding the "required or permitted" exception to the Human Rights Law, the New York State Legislature recognized

that inquiries about an applicant's prior arrest record are clearly relevant and appropriate in certain occupations. This exception was necessary because many New York State and federal laws related to issues of public health or safety authorize such inquiries. *See, e.g.*, 5 U.S.C.A. § 9101(b)(1) (West 1996) (criminal history information must be made available for the purpose of determining eligibility for access to classified information and national security duties); 15 U.S.C.A. § 78(q) (West 1981) (members of Securities Exchange Commission and brokers, dealers, etc., must submit to criminal history investigation); N.Y. General Business Law §§ 72, 81 (McKinney's 1986) (applicants for private investigator, watch, patrol, or guard agency license must submit to criminal history investigation); N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 309 (McKinney's 1986) (same for participants or employees at harness racing tracks); N.Y. Banking Law § 22 (McKinney's 1986) (same for applicants for licensed lenders, service agencies). The Legislature did not attempt to limit the scope of this exception by listing all of these laws in Executive Law § 296(16). It instead left the exception open-ended by incorporating by reference all federal and state laws "requiring or permitting" such inquiries.

Niagara Mohawk was "required or permitted" to inquire into Petitioner's criminal history pursuant to the regulatory scheme established by Congress under the Energy Reorganization Act of 1974, 42 U.S.C.A. § 5841 *et seq.* (West 1983) ("ERA"), and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, 42 U.S.C.A. § 2169 (West 1995) (the "Security Act"). In the ERA, Congress established the NRC and directed that agency to develop and implement sufficient licensing and regulatory requirements for entities licensed to operate nuclear power plants to promote their safe and efficient operation and to guard against "threats, thefts and sabotage at those facilities." 42 U.S.C.A. §§ 5841 and 5844.

Pursuant to this statutory direction, the NRC promulgated regulations requiring all licensees to develop a physical security plan for their nuclear power plants that includes a "personnel access authorization program" covering those individuals working in "protected and vital areas" of the facility. 10 C.F.R. § 73.56(a) (1993).[1] The NRC's stated objective in requiring personnel access authorization programs was to "provide high assurance that individuals granted unescorted access are *trustworthy and reliable* and do not constitute an unreasonable risk to the health and safety of the public . . ." *Id.* (emphasis added).

The NRC regulations expressly require licensees to develop information that, "at a minimum," is sufficient to permit a background investigation concerning the "criminal history" of all unescorted access applicants. 10 C.F.R. § 73.56(b)(1) (1993). This broad NRC minimum standard clearly requires, or at the very least permits, licensees to inquire into the unescorted access applicant's prior arrest activity. There are several reasons that compel this conclusion. First, the NRC regulations do not direct licensees to develop information only with respect to the applicant's "conviction history." To the contrary, the NRC regulations employ the term "criminal history" because it is obviously broader and encompasses both arrests and convictions. If the NRC intended to limit the background checks to convictions only, it knew how to do so. The NRC regulations applicable to the granting of access to prospective or current NRC employees to certain secured information specifically direct the NRC to consider prior "convictions" as a part of the background evaluations performed with respect to these individuals. 10 C.F.R.

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1. The personnel access authorization program must be drafted as part of a licensee's application for an operating license, and must be maintained for NRC review. 10 C.F.R. § 50.34(p)(2) (1993).

§ 10.11(a)(8),(9) (1993). The NRC's specific reference to the term "convictions" in these other NRC regulations is strong evidence that when the NRC broadly directed licensees "to develop information" concerning the "criminal history" of applicants for access to nuclear power plants it intended to require, or at least permit, licensees to inquire about both convictions and arrests.

Under certain circumstances specified in its regulations, the NRC permits licensees to deny access to anyone who has been arrested but not convicted. *See* 10 C.F.R. § 73.57(c)(i) (1993).[2] Obviously, a licensee must be permitted to ask applicants about their prior arrest records to determine whether denying unescorted access because of these arrests is appropriate.

Finally, the NRC is aware that licensees obtain complete arrest record information from the FBI pursuant to the fingerprinting procedures set forth in the Security Act. That statute was enacted to ensure that licensees obtain complete criminal history reports concerning all unescorted access applicants. 42 U.S.C.A. § 2169(a). The NRC regulations promulgated under the Security Act also state that the record obtained from the FBI must be reviewed by the licensee "as *part* of a criminal history records check." 10 C.F.R. § 73.57(b)(8)

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2. Under the Security Act and the NRC's regulations, a licensee may not deny unescorted access "solely on the basis of an arrest that is more than one year old . . . or an arrest that resulted in dismissal" of the charge. By using the phrase "solely on the basis of" before the references to arrests that are more than one year old or arrests that resulted in a dismissal of the charge, the Security Act and the NRC regulations permit licensees to consider such arrests along with other factors in determining whether to grant access to nuclear power plants. In other words, Niagara Mohawk and other NRC licensees may inquire into all arrests and may consider those arrests along with other factors in determining whether to grant unescorted access to its plants.

(1993) (emphasis added). Thus, the regulations permit licensees to supplement the information received in the FBI report by other methods. This requirement clearly contemplates that licensees will make direct inquiries into the applicant's criminal history as part of general background checks.

Justice Hayes found that the governing statutes and NRC regulations required, or at least permitted, Niagara Mohawk to inquire into Petitioner's prior arrest record. Therefore, he determined that Petitioner could not show how Niagara Mohawk's inquiries or action violated the language set forth in the Human Rights Law. Justice Hayes' decision was affirmed by the New York appellate courts and provides one independent state law basis for the dismissal of Petitioner's interpretation of Human Rights Law requirements.

B. Petitioner Was Not Protected by the Human Rights Law Because He Misrepresented His Criminal History.

Justice Hayes also determined that Petitioner was not protected by the Human Rights Law because he "was less than truthful on his certification application." (Petition, App. 8). This determination is also consistent with prior rulings by the New York courts. The Human Rights Law has never been interpreted to prevent employers from taking adverse employment action against individuals, such as Petitioner, who fail to respond honestly to inquiries on an employment or other application.

In *Stewart v. Civil Service Commission*, 446 N.Y.S. 2d 948 (1st Dep't 1982), the New York Appellate Division, First Department, rejected a Human Rights Law complaint brought by an applicant who was rejected after misrepresenting his

criminal history on a personal history questionnaire. The court explained:

> There is nothing in the record to indicate that [the applicant] was penalized because of his prior criminal record. What is obvious from the record is that [the applicant] was disqualified simply because he had lied on his application. Misstatement of a material fact about one's personal history warrants disqualification.

Id. at 950 (citations omitted).

Justice Hayes' final ruling in this case is similar to that in *Stewart,* which was based entirely upon interpretation and application of New York state law. Under these circumstances, Niagara Mohawk respectfully submits that this Court should decline to review this petition in accordance with "the independent and adequate state ground doctrine." *Coleman v. Thompson,* 501 U.S. at 729.

II.

THE STATE COURT DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

Even if this Court had jurisdiction over this petition, there is no substantive basis to grant certiorari in this case because the New York state courts did not decide an important question of federal law in a way that conflicts with prior decisions of this Court or of other federal courts.[3] The determination that

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3. *See* Rule 10 of the Rules of the Supreme Court.

Petitioner's Human Rights Law claims were preempted by the federal nuclear regulatory laws, in fact, is fully consistent with relevant prior decisions and should not be disturbed.

This Court has repeatedly held that federal preemption of conflicting state laws ". . . is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In addition to express preemption, the federal courts recognize two types of implied federal preemption of state laws: (1) field preemption, where the scheme of federal regulation is so pervasive as to leave no room for state regulation (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)); and (2) conflict preemption, where "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)), or where state law "stands as an obstacle to accomplishment of the execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Justice Hayes' decision does not specify which preemption doctrine he found to have precluded Petitioner's Human Rights Law claims. Nevertheless, it is clear that each of the preemption theories is applicable in this case.

A. The Security Act Expressly Preempts the Human Rights Law's Restrictions On Criminal History Inquiries.

The Security Act explicitly requires NRC licensees "to fingerprint each individual who is permitted unescorted access to the facility . . ." 42 U.S.C.A. § 2169(a). The Security Act additionally directs licensees such as Niagara Mohawk to submit those fingerprints to the NRC, which in turn forwards

them to the FBI through the United States Attorney General. *Id.* The NRC licensee then receives from the FBI a report on both arrests and convictions. With respect to the procedure by which a licensee receives arrest information, the Security Act provides, in pertinent part, that:

> *Notwithstanding any other provision of law,* the Attorney General may provide all the results of the search to the Commission, and, in accordance with regulations prescribed under this section, the Commission may provide such results to the licensee or applicant submitting such fingerprints.

Id. (emphasis added).

The Security Act phrase — "notwithstanding any other provision of law" — expressly forecloses Petitioner's argument that Niagara Mohawk was prohibited from inquiring into or considering the prior arrest record of an unescorted access applicant. The legislative history behind the Security Act confirms that Congress wanted licensees to obtain and consider this information:

> [T]he bill will help to ensure that only individuals who are reliable and trustworthy have access to critically sensitive areas thereby significantly improving the security of the nuclear power facility. *By allowing nuclear power reactor operators to have access to the FBI's criminal history records files, they would be able to obtain more complete criminal histories.* That information is an *essential element* in the determination of who should be granted unescorted access to nuclear facilities.

S. Rep. No. 143, 99th Cong., 1st Sess. 1 (1985) (emphasis added).

Because the plain language and the legislative history of the Security Act expressly authorized Niagara Mohawk — "notwithstanding any other provision of law" — to obtain and consider a complete criminal history report on Petitioner, including information about his prior arrests, any contrary interpretation of the Human Rights Law would be unenforceable under the doctrine of express federal law preemption.

B. Petitioner's Human Rights Law Arguments Conflict With Federally Mandated Nuclear Safety And Security Requirements.

This Court has previously determined that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Electric v. State Energy Resources Conservation and Dev. Comm'n, et al.*, 461 U.S. 201, 212 (1983). *See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 550 (1978). Several other federal courts have similarly held that the federal government has exclusive authority to regulate all aspects of the nuclear safety and security field. *See, e.g., County of Rockland v. NRC*, 709 F.2d 766, 770 (2d Cir.), *cert. denied*, 464 U.S. 993 (1983); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1150 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778 (D.C. Cir. 1968).

The broad preemptive effect of these nuclear safety and security laws has also been uniformly acknowledged by the federal courts. *See, e.g., Pacific Cas. & Electric v. State Energy*

Resources Conservation and Dev. Comm'n et al., 461 U.S. at 212;*Northern States Power Co. v. Minnesota*, 447 F.2d at 1150. This Court's decision in *English v. General Electric Co.*, 490 U.S. 72 (1990) is not to the contrary. In *English*, this Court ruled that ". . . not every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field." 496 U.S. at 85. However, this Court also stated in *English* that a state law will ". . . fall within the pre-empted zone, [if it has] a direct and substantial effect on the decisions of those who build or operate nuclear facilities." *Id.*

Petitioner's arguments in this case do not involve issues that "in some remote way" relate to nuclear safety. *Id.* Rather, the unescorted access requirements and procedures applied by Niagara Mohawk in this case are "directly and substantially" related to nuclear safety issues. *Id.* Indeed, the express purpose of the NRC regulations, which Niagara Mohawk followed in this case, is to ensure that individuals who are granted access to nuclear power plants are "trustworthy and reliable" and do not pose "an unreasonable hazard or risk to the public health and safety." 10 C.F.R. § 73.56(a). Thus, if the Human Rights Law were interpreted as Petitioner urges, it would overlap and intrude upon the area of nuclear safety and security and would "fall within the pre-empted zone" identified by this Court in *English* and earlier decisions. 496 U.S. at 85.

The New York State Court determination that federal law preempts Petitioner's Human Rights Law claim is fully consistent with the prior decisions of this Court and the other federal courts. Accordingly, even if this Court finds that it has jurisdiction over the petition, Niagara Mohawk respectfully submits that the petition must be denied because there is no substantive basis for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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